

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7020

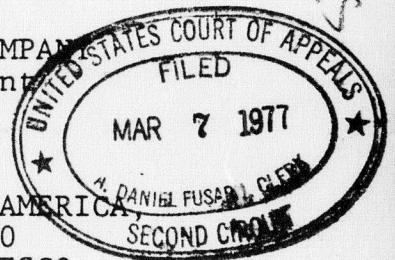
**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-7020

INTERNATIONAL SILVER COMPANY
Plaintiff-Appellant

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, AND LOCAL #7770
U.S.W.A. AND ANTONIO ARESKO
Defendant-Appellees



**On Appeal From the United States District Court
for the District of Connecticut**

BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Cases and Miscellaneous Authority	ii
Statement of the Issue Presented	1
Statement of the Case	2
Argument	
I. The award should have been vacated because it is based on oral agree- ments which would add to and amend the contract	5
II. Reference to the bargain- ing relationship does not justify reliance on ex- traneous oral agreements contrary to the written contract	14
III. Deferral to the arbitra- tor is inappropriate when the award contradicts un- ambiguous contract language	23
Conclusion	28

TABLE OF CASES AND MISCELLANEOUS
AUTHORITY

<u>Case</u>	<u>Page</u>
<u>Humble Oil & Refining</u> <u>Company v. Local 866,</u> <u>Int. Bro. of Team.,</u> <u>Etc., 477 F.2d 229</u> <u>(2d Cir. 1971)</u>	14, 17-18, 25- 26
<u>I.U.E. v. General Elec-</u> <u>tric Co., 407 F.2d</u> <u>253 (2d Cir. 1968)</u>	16
<u>Medo Photo Supply Corp.</u> <u>v. Livingston, 274</u> <u>F.Supp. 209 (S.D.N.Y.</u> <u>1967); aff'd per curiam</u> <u>386 F.2d 451 (2d Cir.</u> <u>1967)</u>	17
<u>Timken Company v. Local</u> <u>Union No. 1123, United</u> <u>Steelworkers of America,</u> <u>AFL-CIO, 482 F.2d 1012</u> <u>(6th Cir. 1973)</u>	19-22, 28
<u>Torrington Co. v. Metal</u> <u>Products Workers Union</u> <u>Local 1645, 362 F.2d</u> <u>677 (2d Cir. 1966)</u>	11-13, 15-16, 22, 26-29
<u>United Steelworkers of</u> <u>America v. American</u> <u>Manufacturing Co., 363</u> <u>U.S. 564 (1960)</u>	21

United Steelworkers of
America v. Enterprise
Wheel & Car Corp., 363
U.S. 593 (1960)..... 7, 11, 15,
21-24, 28

United Steelworkers of
America v. Warrior &
Gulf Navigation Co.,
363 U.S. 574 (1960)..... 14, 21

Miscellaneous Authority

United States Code, Title
29, Section 185 (Labor-
Management Relations Act,
Section 301)

STATEMENT OF ISSUE PRESENTED

Whether the District Court erred in holding that the arbitrator did not exceed his authority by relying on alleged oral agreements which were not incorporated in the written contract and which were in conflict with the specific terms of the written contract.

STATEMENT OF THE CASE

Plaintiff (appellant) in this action is International Silver Company (the Company), which seeks to have an arbitrator's award vacated under 29 U.S.C. §185 (Section 301 of the Labor-Management Relations Act), because the arbitrator exceeded his powers by basing his award on alleged oral agreements outside the contract. The defendants (appellees) are United Steelworkers of America, AFL-CIO and Local 7770 U.S.W.A. (the Union), parties to the contract under which the original grievance was filed, and Antonio Aresco, the employee of the Company who filed the grievance.

The facts on which this appeal is based are not in dispute. In February 1971 the Company was not organized by any union, and unilaterally instituted an incentive wage system, converting a piece rate system to a standard hourly rate system. As a result, certain employees received lower pay. To correct this problem, the Company granted such employees

"red circle" or "side car" payments, which in effect maintain an employee at his or her previous, higher wage level until the regular pay for his or her job catches up through negotiated increases.

In August 1971 Antonio Aresco was employed and was entered on the Company records as a new hire, although he had previously worked there until laid off in May 1970. The Company policy at the time of Aresco's layoff and rehiring was to treat persons on layoff for more than one year as new hires for the purpose of seniority and all benefits.

Subsequent to Aresco's being employed anew, the Company entered into a collective bargaining agreement dated March 26, 1973 with defendant Local 7770, United Steelworkers of America, AFL-CIO. Defendant Aresco filed a grievance under the newly available contract procedure, (J.A. at 11) on August 23, 1973, alleging that by refusing him a

"sidecar" payment similar to those granted employees employed at the time of the transition in February 1971, the Company was "guilty of acting in a discriminatory nature, and is in violation of Federal Labor Laws, pertaining to equal pay for equal work."

This claim proceeded through the prescribed steps to arbitration, which was held May 8, 1974, before Lewis M. Gill, Arbitrator.

Mr. Gill rendered his decision (J.A. at 24) in this matter on June 4, 1974. He found that the Company had negotiated a new policy, as set forth in the contract (J.A. at 15), which increased the duration of layoff with retention of seniority and other benefits to two years. Relying on alleged oral agreements between the Company and the Union, he concluded that this change should be applied retroactively to Aresco and others similarly situated to grant them the same "sidecar" payments granted to those employees employed in February 1971.

The Company brought suit in state court to vacate the arbitration award. On petition of defendant United Steelworkers of America, AFL-CIO et al., the cause was removed to the federal District Court for the District of Connecticut. The District Court refused to set aside the award, from which decision the Plaintiff Company brings this appeal.

ARGUMENT

- I. THE AWARD SHOULD HAVE BEEN VACATED BECAUSE IT IS BASED ON ORAL AGREEMENTS WHICH WOULD ADD TO AND AMEND THE CONTRACT.

The award of Arbitrator Gill (J.A. at 24) is based on alleged oral agreements made in private conversations extraneous to the contract, and consequently exceeds the arbitrator's authority. The arbitrator's specific reliance on alleged oral agreements that were never part of the contract dated March 26, 1973, is seen in the award itself.

...I conclude that there was not any specific discussion of the precise point at issue here, and that there was a general agree-

ment of the sort described by Sartori (and not specifically denied by Trenchard). That general agreement, I find, was to the effect that whatever agreement on extending recall rights was reached, would be applied to all benefits dependent on length of service, subject only to the qualification that there would be no monetary liability for past actions taken under the old policy.

Opinion, at 4 (J.A. at 28). These conclusions by the arbitrator are crucial to the issue before this Court on appeal: did this arbitrator exceed his authority by relying on extraneous agreements rather than the specific contract language? These comments reveal that the basis for the arbitrator's award was found outside of the contract. He chose one of two irreconcilable versions of a contested oral agreement and ignored the express provisions of the contract. Consequently, the arbitrator exceeded his authority because:

his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the

the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 597 (1960).

Examination of the contract reveals that its express provisions contradict rather than support the arbitrator's award. To be sure, the pre-existing policy regarding the length of time for which a laid-off employee retained recall rights, and therefore seniority, was changed. The Company's earlier policy, adopted unilaterally prior to any union representation at its plants, specified that recall rights would be retained during the first year of lay-off. (J.A. at 40). The collective bargaining agreement specifically altered this policy in Article X, Section 3(g), which provides that seniority is re-

tained by employees on layoff for a period not exceeding two years. (J.A. at 15).

This change did not, however, affect Aresco in any way, since his layoff and reemployment without seniority occurred years earlier. The contract did not call for retroactive application of its terms. On the contrary, the effective date for "all its terms and provisions" (emphasis added) was to be March 26, 1973. (J.A. at 22). The grievance procedure also reflects the fact that the contract specifically excludes retroactive application of its terms, see Article IX, Section 2(b) (J.A. at 13), and the specific provision covering "sidecar" payments (Article XVII, Section 2(f), J.A. at 19) contemplates application only to employees "whose current hourly rate" (i.e. as of the effective date of the contract) included a "sidecar" payment.

The Union also acknowledged that the grievance was not supported by the contract language. The original grievance form (J.A. at 70) states that the writer believes himself to be discriminated against because he did not receive equal pay for equal work, i.e. "sidecar" payments. Nowhere does the form specify a contract provision alleged to have been violated, as required by the grievance procedure. Article IX, Section 1. (J.A. at 11). The claim is couched in terms of discrimination, not contract interpretation.

Without a grievance based upon the contract or a contractual remedy to an alleged wrong, the arbitrator was obligated under the contract to deny the grievance. His authority was circumscribed by the contract, which defines a grievance as "a difference...between the Company, the Union or any employee concerning the interpretation, application, compliance or non-compliance with the provisions

of this Agreement." Article IX, Section 1 (J.A. at 11). The same Article IX restricts the Arbitrator's authority even further:

The arbitrator shall have the authority to apply the provisions of the contract but in so doing shall have no power to add to or subtract from or modify in any way any of the terms of this Agreement.

Article IX, Section 2(d) (J.A. at 13)

The arbitrator was without any contractual support for the Union's position that Aresco, hired without seniority prior to the effective date of the contract, should subsequently be given retroactive seniority. In view of the contractual limitations on his authority, the arbitrator failed in his duty by deciding the grievance on the basis of an alleged agreement that was never incorporated into the collective bargaining agreement.

Faced with such manifest disregard for the limits on the arbitrator's authority, the District Court erred in refusing to vacate the arbitration award. Since an award is

valid "only so long as it draws its essence from the collective bargaining agreement," the federal courts are obligated to vacate an award which does not meet this crucial requirement. United Steelworkers of America v. Enterprise Wheel and Car Corporation, supra.

This Court has recognized its duty to vacate arbitration awards which so obviously are without support in the collective bargaining agreement. In Torrington Co. v. Metal Products Workers Union Local 1645, 362 F.2d 677 (1966), this Court affirmed a District Court order vacating an arbitration award which found an employee benefit not within the terms of the contract, but from a prior practice discontinued by the employer. This Court held that the arbitrator had improperly added to the contract a provision which had been discussed by the parties but not agreed to in writing, in violation of a contractual limitation on the power of an ar-

bitrator almost identical to that contained in the collective bargaining agreement in the instant case. (J.A. at 13). The Court stated that

the arbitrator's decision that he has authority should not be accepted where the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue.

362 F.2d at 680. The court noted that labor contracts generally state affirmatively what concessions management agrees to make to the union, and that through arbitration the union was attempting to add a benefit it did not consider sufficiently vital to insist upon in writing during negotiations.

That same strategy is evident in the present case. As pointed out above, no contract provision could be produced to support the assertion that seniority and sidecar payments should be granted retroactively to Aresco and others similarly situated. The arbitrator instead looked outside the contract to the alle-

ged oral agreement. But to be enforceable by an arbitrator the benefit must at least arguably be set forth in the contract. This requirement is particularly crucial here as in Torrington, where the benefit, according to the Union's position (accepted by the arbitrator), was discussed but not incorporated in the contract:

While it may be appropriate to resolve a question never raised during negotiations on the basis of prior practice in the plant or industry, it is quite another thing to assume that the contract confers a specific benefit when that benefit was discussed during negotiations but omitted from the contract.

362 F.2d at 681. Particularly if the parties discussed retroactive application of the seniority provision to Aresco and others, as the arbitrator determined here, their failure to provide this benefit in the contract makes impossible a valid award granting the benefit.

II. REFERENCE TO THE BARGAINING RELATIONSHIP DOES NOT JUSTIFY RELIANCE ON EXTRANEIOUS ORAL AGREEMENTS CONTRARY TO THE WRITTEN CONTRACT.

The District Court attempts to counter the argument set forth above by reference to the well-established rule that the arbitrator may go beyond the four corners of the contract to the practices of the industry and of the shop to interpret ambiguous contract proposals. United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574, 581-582 (1960); see Humble Oil & Refining Company v. Local 886, Int. Bro. of Team., Etc., 447 F.2d 229 (2d Cir. 1971). The Court concludes:

The oral agreements entered into between the parties draw their essence from the collective bargaining agreement as part of the contract negotiations. They are essential to a correct construction and application of the contract; and therefore, the arbitrator's decision was within his delegated power.

Decision of the District Court at 4 (J.A. at 77). The District Court misapplies established

principles of labor law, under which recourse to bargaining history is permitted only in interpreting ambiguous contract language, not in supplementing or amending existing contract language which is clear on its face.

The District Court is entirely correct in stating that the arbitrator may look beyond the contract to bargaining history, but use of such background information has been carefully limited by the courts:

...an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.

United Steelworkers of America v. Enterprise Wheel and Car Corporation, supra, at 363 U.S. 597. In Torrington, supra, this Court held that bargaining history may be considered only when the language is otherwise ambiguous. Since in that case no provision in the contract was ambiguous regarding the benefit claimed, the arbitrator's award based

on bargaining history could not be sustained. Similarly here the contract does not provide for retroactive application of its terms to provide additional seniority to Aresco and others. Consequently, the use of the alleged oral agreement to supplement or amend the contract, rather than to interpret an ambiguous provision, is beyond the arbitrator's authority under the contract and requires that this award be set aside.

This limitation on the use of bargaining history to supplement the contract has been recognized in decisions of this Circuit subsequent to Torrington, supra. Arbitrators have been permitted to decide grievances only where the contract contains "specific language that arguably expressly covers" the point at issue. I.U.E. v. General Electric Co., 407 F.2d 253 (2d Cir. 1968). An arbitrator may look outside the contract to establish the facts on which the grievance is based, but once those facts are

established, the applicable "law" must be found in the collective bargaining agreement. In Medo Photo Supply Corp. v. Livingston, 274 F.Supp. 209 (1967), aff'd per curiam 386 F.2d 451 (1967), an arbitrator looked to a prior arbitration award to find the wage base on which to compute a contractually scheduled pay increase. Since his computation was based on "increases set forth in the contract" (274 F.Supp. at 215), his award could not be set aside.

Reliance on Humble Oil & Refining Co. v. Teamsters Local 866, 447 F.2d 229 (2d Cir. 1971) is misplaced, since in that case the arbitrator did rely on specific contract language, and merely confirmed his opinion by reference to a written agreement executed in conjunction with the contract. He found the separate agreement did not cover the point in issue, and therefore turned to the contract terms as the basis for his decision. The court restricts

the use of non-contract "tools of construction" to situations where the contract is ambiguous or contains no evidence of the intent of the parties. It specifically declines to hold that a written agreement separate from the contract is subject to the arbitration procedure. Neither Humble nor decisions from other jurisdictions cited by the defendants can support an arbitrator's reliance on discussions subsequent to the contract, especially where the parties disagree on the matters discussed.

The fact that recourse to bargaining history is impermissible and in excess of an arbitrator's authority when used to contradict, supplement or amend express contract terms is also recognized in other Circuits. The Sixth Circuit, for example, recently faced a situation remarkably similar to the instant appeal and held that an arbitrator's award had to be

vacated. Timken Company v. Local Union
No. 1123, United Steelworkers of America,
AFL-CIO, 482 F.2d 1012 (6th Cir. 1973).

There the company terminated the employment of an individual serving twenty-nine days in jail for a traffic offense, relying on an express contract provision which stated that "an unauthorized absence of seven (7) consecutive days shall be considered a voluntary quit);...." 482 F.2d at 1013. The Steelworkers Union grieved this action all the way to arbitration, where the arbitrator ordered reinstatement because the voluntary quit provision was discriminatory. The termination was held to be unenforceable because the company had failed to comply with the requirements regarding discharge.

The District Court, affirmed by the Sixth Circuit, supra, held that the award had to be vacated because the arbitrator exceeded his authority. The contract language on unauth-

orized absences was unambiguous, and consequently the arbitrator exceeded his authority by looking beyond the contract and bargaining history relevant to its specific terms to find the provision unenforceable. The arbitrator had, in the court's view, no right to ignore the express contract provisions and invalidate the company's action because of inequities he perceived in the company's failure to authorize such absences:

Consequently there was no need to go outside the record and consider other definitions of the term "quit." A collective bargaining agreement is after all a contract and the arbitrator is limited to the interpretation and application of the contract. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L. Ed. 2d 898 (1964). Particularly where an agreement provides definitions of its own terms, the arbitrator clearly exceeds his own authority by seeking conflicting definitions outside the record.

482 F.2d at 1015.

The Timken case, supra, more faithfully reflects the national labor policy enunciated

in the Steelworker's Trilogy than does the District Court's decision in the instant case. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., supra; United Steelworkers v. Enterprise Wheel & Car Corp., supra. In Timken the court vacated an arbitrator's award because reliance on extraneous information is inconsistent with contractual limitations on the arbitrator's authority, through any means including bargaining history, to interpret the contract and the contract alone. The District Court here, however, confirmed the arbitrator's award even though it was based on an alleged agreement which 1) was between two individuals outside the context of formal negotiations and 2) was never incorporated into the contract itself.

To allow the District Court's broad view of bargaining history to prevail would destroy the ability of collective bargaining

agreements to avoid industrial strife; the use of bargaining history to contradict clear contract language would undermine the certainty and security that such contracts bring to industrial relationships. Clearly the arbitrator was empowered to consider the bargaining history of the parties to interpret specific provisions of the contract. Equally clearly, however, the arbitrator had no authority whatever to make a factual determination that the parties agreed to apply the seniority provision and sidecar rights retroactively in the face of unambiguous contract language to the contrary.

The District Court correctly refrained from reviewing the merits of the factual determination, but it incorrectly allowed "bargaining history" to assume an independent life of its own. Principles of labor established in Enterprise Wheel, supra, and recognized in Torrington and Timken, supra, preclude recourse to bargaining history to

breathe independent life into agreements never incorporated into the contract. The District Court misperceived the proper limits to the use of extraneous oral discussions in interpreting the contract, and therefore its decision must be set aside.

III. DEFERRAL TO THE ARBITRATOR IS INAPPROPRIATE WHEN THE AWARD CONTRADICTS UNAMBIGUOUS CONTRACT LANGUAGE.

The Steelworkers Trilogy, supra, established the well-recognized federal policy of deferral to arbitration awards. The reviewing court does not sit to substitute its view of the facts or its interpretation of the contract for that of the arbitrator. United Steelworkers v. Enterprise Car and Wheel Corporation, supra, 363 U.S. at 598. Were that the Company's request, this Court would have no choice but to reject the Company's claim on appeal.

But the Company respectfully urges here that since the parties' contract unam-

biguously and unequivocally forecloses retro-active application of any of its provisions, including seniority, the arbitrator exceeded his power by looking beyond this concrete expression of intent to alleged extraneous oral agreements. The Company requests not that this Court review the decision on the merits, but rather that this Court exercise the supervisory responsibility which the Steelworkers Triology, supra established:

When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel and Car Corporation, supra, 363 U.S. at 597.

Deferral to the arbitrator in this case is inappropriate because the award on its face is based on alleged oral agreements that were and are not part of the contract from which the arbitrator's authority is derived. The arbitrator's conclusory state-

ments that these agreements only helped him to interpret the seniority provision of the contract, Article X, Section 3(g) (J.A. at 15), must be rejected because the clear language of the contract refutes assertions of retroactivity. The extraneous agreements, not the contract itself, were the basis for his award; no "interpretation" of the existing contract could possibly provide the result reached; that seniority be retroactively applied to Aresco and others similarly situated, because clear manifestations of the contrary intent are in the contract itself.

Courts have repeatedly recognized the distinction between an impermissible review of an arbitrator's award on the merits and the essential supervisory role of the court over the scope of an arbitrator's authority. In Humble Oil and Refining Company v. Local 866, Int. Bro. of Team., Etc., supra, this Court fulfilled

that role, declaring "In sum, the Chairman [of the arbitration panel] found that the laid-off workers 'were entitled to retain [the allowance] under the contract.' (Emphasis added)." 447 F.2d at 232. The arbitrator did not exceed his authority because he remained faithful to the contract.

To be sure, in that case this Court also rejected a Company claim that the dispute was non-arbitrable, recognizing the propriety of deferring to the arbitrator's determination of arbitrability if it finds support in the contract. This deference, however, underscores the distinction between Humble Oil, on the one hand, and Torrington Co. v. Metal Products Workers Union Local 1645, AFL-CIO, supra, as well as the present appeal, on the other. Where the arbitrator adheres to his responsibility to interpret and administer the contract, his decision is unassailable. Where, however, he looks outside the contract and in fact makes an award which

has no support in the contract or, as here, which flatly contradicts the contract, the court must refuse to enforce the award because:

...the question of an arbitrator's authority is subject to judicial review, and...the arbitrator's decision that he has authority should not be accepted where the reviewing court can clearly perceive that he has derived that authority from sources outside of the collective bargaining agreement at issue.

Torrington Co. v. Metal Products Workers Union Local 1645, AFL-CIO, supra, 362 F.2d at 680.

It is respectfully urged that the District Court's deference to the arbitrator's decision was contrary to the national labor policy of judicial supervision of the source of the arbitrator's authority. The limited review sought here is based on an essential element of national labor policy because the integrity of the arbitration process is preserved only as long

as the arbitrator is "not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement they negotiated." (Emphasis added). Torrington Co. v. Metal Workers Products Union Local 1645, supra, 362 F.2d at 682; United Steelworkers v. Enterprise Wheel and Car Corp., supra; see Timken Co. v. Local Union No. 1123, United Steelworkers of America, supra.

CONCLUSION

The Company well recognizes the limitations on judicial review of an arbitration award issued under a collective bargaining agreement. Such an award, however, is immune from judicial scrutiny only as far as it derives its essence from the contract. Here the arbitrator ignored the express provisions of the contract and relied on an oral agreement to supplement and/or amend the contract, despite its clear proscription of precisely such an

action. He has presumed to add an entirely new element to the contract, retroactive application of seniority and sidecar rights to certain individuals, which the union claims was discussed in negotiations, and which therefore would have been incorporated in the contract had both parties agreed to such a provision.

The reasoning of this Court in Torrington Co. v. Metal Products Workers Union Local 1645, 362 F.2d 677 (1966) should be applied to this case. In both cases the arbitrator attempted to add to the contract a benefit that had been discussed in negotiations, but never incorporated into the contract. By referring to bargaining history to alter rather than interpret the contract, the arbitrator has gone too far. He has exceeded his authority, and therefore his award is void and unenforceable.

Appellant International Silver Company respectfully requests that the judgment of the District Court be reversed and the matter be remanded to the District Court with an order to vacate the arbitration award.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were deposited in the United States mails, first class, postage prepaid, this 5th day of March, 1977, addressed to each of the following:

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